Supporting the Troops After Military Service

Returning vets are owed their jobs back, unless...

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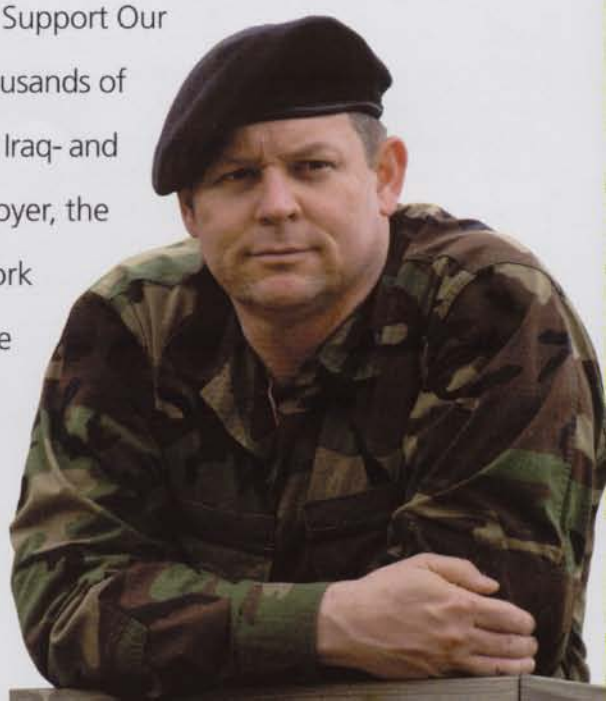
Everyone has seen the ubiquitous bumper stickers that enjoin us to "Support Our Troops." It turns out that the exhortation is not merely rhetorical. Thousands of employees are returning from extended deployment in connection with Iraq- and Afghanistan-related service. If you happen to be the "troop's" employer, the chances are that you owe an employee, who seeks to return to work following military service, his or her job back. The focus of this article is the returning serviceperson's employment rights following extended service (180 days or more)[1] under the Uniformed Services Employment and Re-employment Rights Act (USERRA).



Historical Background

The United States has a long history of protecting certain facets of a serviceperson's non-military relationships and concerns. During the Civil War, Congress passed legislation that effectively suspended both civil and criminal actions against federal soldiers fighting for the Union. Post deployment rights became a more explicit focus during World War I with the Soldiers and Sailors Civil Relief Act (SSCRA). As the Nation neared World War II, Congress re-enacted the SSCCRA and also enacted the Selective Training and Service Act (STSA) to explicitly focus on veterans' re-employment rights. In the words of then Sen. Elbert Thomas, "If it is constitutional to require a man to serve in the Armed Forces, it is not unreasonable to require the employers of such men to rehire them upon the completion of their service, since the lives and property of the employers and everyone else in the United States are defended by such service."

Following on the heels of World War II, Congress enacted the Universal Military Training and Service Act, the Military Selective Service Act, and, in the Vietnam era, the Vietnam Era Veterans' Readjustment Assistance Act. Finally, in 1994 Congress enacted USERRA, the current statutory scheme.

Particularly following the Vietnam War, the concerns of Congress have been two-fold. First, with the end of involuntary conscription, the right to re-employment was seen as an important inducement for people who wanted to voluntarily enlist for something short of a military career. Secondly (and really a component of the first concern), our military has developed a concept known as Total Force Integration. Under this concept, the military no longer relies on the draft to fill up needed slots in times of armed conflict. Rather, the active component of the military is increasingly reinforced by levying into the ranks of the reserve forces. The era of the "Weekend Warrior" is substantially over. Reservists face a realistic chance of being recalled to active duty in time of exigent circumstances.

Re-employment Rights

An analysis of a returning veteran's rights begins with 38 U.S.C. section 4312. As concerns us here, that section informs: "... [A]ny person whose absence from a position of employment[2] is necessitated by reason of service in the uniformed services shall be entitled to the re-employment rights and benefits" outlined elsewhere in the Act. The use of the word "shall," in accordance with commonplace statutory construction, makes re-employment mandatory. "Viewing section 4312's plain language, and mindful of the mandate to construe the USERRA liberally for the benefit of servicepersons, this Court finds that section 4312 creates an unqualified right to re-employment to those who satisfy the service duration and notice requirements." Jordan v. Air Products and Chemicals (2002) 225 F. Supp 2nd 1206.

And the components of the entitlement are not difficult to find. Section 4312 (a) informs that a person is entitled to re-employment if:

"(1) the person...has given advance written or verbal notice of such service to such person's employer;

(2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and

(3) ...the person reports to, or submits an application for re-employment to, such employer..." Additionally, the employee must have separated from the service under other than dishonorable circumstances.

Focusing on the veteran who has been deployed for 180 days or more, section 4316 (c) informs that "A person who is re-employed by an employer under this chapter shall not be discharged from such employment, except for cause, (1) within one year after the date of such re-employment, if the person's period of service before the re-employment was more than 180 days..." "Cause" contemplates something more than sheer arbitrariness, and it must be based upon an objective reason. A ground for discharge that does not violate any law when applied to an unprotected employee, such as the fact that the employer may simply dislike the employee, does not constitute sufficient cause under the statute. The employer must go further than asserting his subjective feelings and must be prepared to show that the veteran has been discharged for some cause based upon objective criteria relating to work standards.

At the expiration of one year after the veteran's return to work, he or she then falls back into the ordinary ambit of employment. For instance, absent an employment contract or some other external reason, the veteran can be terminated "at will" just as any other employee.

A more vexing problem can be succinctly summarized with the rhetorical question, "What must an employer re-employ the veteran as?" Section 4316 offers general guidance. A returning veteran "is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed." As some commentators have noted, this means that an employee is entitled, as if on an escalator, to return to the position he or she would have attained, not merely the position he or she left.

He or she also is entitled "to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service."

The cases suggest a "best efforts" mechanism. Thus an employer's offer to place a veteran in a position that, while not identical to position he held before entering service, was similar in seniority, status, and pay, satisfied the employer's obligation under the predecessor to the USERRA statute. Bowen v. Home Beneficial Life Ins. Co. (4th Cir. 1950) 183 Fed. 2nd 376.[3] On the other hand, a position offered by the employer was not of like seniority, status, and pay to that which was held prior to entering service when the veteran had been director and vice-president of the employer. His new job required that the veteran start from scratch, recruiting a sales force and building the business in an assigned region, and denied to the veteran a percentage of all founding fee income of the company, which had been an attractive feature of the veteran's original position. Trusteed Funds, Inc. v. Dacey (1st Cir. 1947) 160 Fed 2nd 413. And sauce for the goose is sauce for the gander. Although a veteran is entitled to be restored to the same character of employment, including pay, which would have been his had he not entered service, his employer has the right to reduce pay or commissions in the same manner as though the veteran had been in continuous employment, provided such reduction applies to all other positions of same or similar nature. Levine v. Berman (7th Cir. 1949) 178 Fed 2nd 440.

Employer's Defenses and Exceptions

Thirty-nine U.S.C. section 4312 (d) is worth quoting at some length with emphasis added:

"(d) (1) An employer is not required to re-employ a person under this chapter [38 USCS 4301 et seq.] if—

(A) the employer's circumstances have so changed as to make such re-employment impossible or unreasonable;

(B) in the case of a person entitled to re-employment under subsection (a) (3), (a) (4), or (b) (2) (B) of section 4313 [38 USCS 4313], such employment would impose an undue hardship on the employer; or

(C) the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurring period, and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.

(2) In any proceeding involving [any of these issues] ...the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.

The statute does not, as it could not, provide any bright-line definitions about the meaning of "impossible," "unreasonable," "undue hardship," and the like. Analysis of the meaning of these words will of necessity be decided by the courts on a case-by-case basis. Because the statute has been cited in court cases less than 20 times, a look at the cases expressly citing to section 4312 necessarily leaves an incomplete picture. The definitional materials furnished by USERRA at least are a starting place. "Impossible" and "unreasonable" are not defined. "Undue hardship" is defined in section 4303 (15):

"The term, 'undue hardship,' in the case of actions taken by an employer, means actions requiring significant difficulty or expense, when considered in light of—

(A) the nature and cost of the action needed under this chapter;

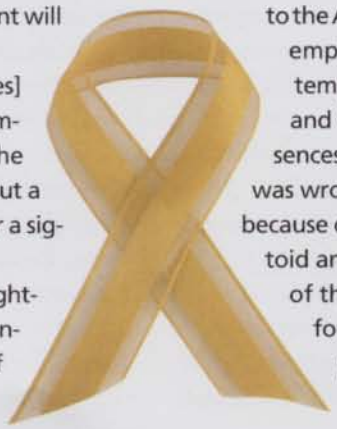
(B) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer."

Surprisingly, the author has not found a single case under USERRA where the statutory definition of "undue hardship" is construed in connection with the facts of the case. There are a number of cases construing undue hardship decided under, e.g., the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA). However, analyses from other statutory schemes are not always helpful given, as here, different objectives served by the statutes. Congress passed USERRA on the premise that a soldier's absence from work to serve in uniform is a socially desirable end in itself and, under the Total Force doctrine, a military necessity. The Rehabilitation Act, the ADA, and similar statutory schemes proceed from an assumption that disabilities that touch upon work performance are simply unfortunate circumstances that must, in some circumstances, be accommodated. Absence for a military purpose is a "good" absence. An absence for health reasons is at best an "unfortunate" absence.

Two cases illustrate the different emphasis of different statutory schemes. The first is Jackson v. Veterans Administration (11th Cir. 1994) 22 Fed. 3rd 277. The case, decided under the Rehabilitation Act of 1973 (identical in the pertinent respects to the ADA), was resolved in favor of the employer. Plaintiff employee was absent six days during a three-month temporary appointment with the defendant employer and was terminated by the defendant for excessive absences. The district court rejected plaintiff's claim that he was wrongfully fired under the Rehabilitation Act of 1973 because of a service-connected disability caused by rheumatoid arthritis. On review of a summary judgment in favor of the defendant, the 11th Circuit affirmed. The court found that requiring defendant to accommodate unpredictable absences, even though they were disability-related, would place upon it an undue hardship.



The second case is Warren v. International Business Machines Corporation (2005 DC SDNY) 358 F. Supp. 2nd 301. With the caveat that this case was decided under section 4311 rather than 4312, the judicial deference to military necessity is demonstrated. The employee was hired as a vendor relations specialist while he was already serving in the Army Reserve. The employee's military duties were increased substantially following 9/11, including a "pop-up" (unscheduled) mission. The employer eventually terminated the employee citing its "zero tolerance" policy relating to some prankish e-mails sent by the employee. The court found that a reasonable jury could find that the employer's stated reason for dismissing him was pretextual. The record contained substantial evidence that the employer was unhappy with the employee's repeated absences for Reserve duty and the possibility that he could be called for further service or active duty on short notice. The court found that a jury could infer that the employee's status as a Reservist was a substantial or motivating factor in his dismissal. In contradistinction to Jackson, supra the court found that the very same phenomenon, unpredictable absences that would amount to undue hardship under the Disability Act of 1973 was evidentiary grist for a discriminatory motive under USERRA.

What about "impossible" and "unreasonable"? The cases following USERRA are silent. However predecessor statutes have generated some guidance. For instance, the abolition of one department, where the employer still employs a number of people is no excuse for failure to re-employ the veteran. Loeb v. Kivo (1947, DC NY) 77 F Supp 523. The abolition of the department did not equate to impossibility. Similarly, the circumstances of the employer had not so changed as to render "unreasonable" reinstatement of the veteran where the veteran, prior to entering service, was employed as a salesman. While the veteran was in service, the employer reorganized his business to do away with the job of a salesman employing active solicitation and transferred such salesmen to the home office to conduct sales by means of indirect communications rather than personal contact. Although the manner of sales solicitation had changed, the sales function had not disappeared, and re-employment was required. Allyn v. Abad (3rd Cir. 1948) 167 Fed. 2nd 901.

In the event of controversy, what is "impossible" and what is "unreasonable" will inevitably turn on the facts of each case. As noted above, in each case the evidentiary burden will be on the employer to make out a defensive case.

The "Captain John A. Doe" Case[4]— A PR Disaster in the making

On December 6, 2002, while he was working full-time for a large multi-billion dollar high tech company, Captain Doe was called to active duty with the United States Army and deployed to Kuwait and Iraq. On February 20, 2003, while he and his unit were in Kuwait preparing for the invasion of Iraq, the employer sent a perfunctory message to Captain Doe's military email address notifying him that his employment had been terminated.

When he returned from service, he reapplied for employment. He was informed that his department had been abolished. A major Bay Area newspaper reported the following:

"It isn't every day a guy gets downsized from a San Jose semiconductor job while he's in the middle of a desert, with tanks rumbling by, sirens shrieking, and sand blowing into his eyes and nose and ears.

But that's what happened to Capt. [Doe], a 36-year-old reservist, who finally got a chance to check his e-mail at a U.S. Army base in Kuwait in spring 2003, after the war with Iraq had started and the troops were moving forward.

'It is with great regret that I must inform you of your position elimination,' said the message from [Doe's employer].

It would be the beginning of a streak of hard luck for the quiet engineer. Over the next year and a half, the East Bay native, recently married and with a newborn daughter, would see his 12-month deployment extended three times.

When he finally got back to Silicon Valley, [Captain Doe] reapplied to [his employer]. He got an e-mail back saying his résumé had been put into the company's database. And that was it.

[Captain Doe] began a full-time job hunt, ultimately sending out hundreds of résumés. Months passed. He was called for a few interviews, but got no offers.

By July, [Captain Doe] had spent his savings, liquidated his 401(k), and raided his daughter's college savings account. His landlord had initiated eviction proceedings after [Captain Doe] had said he could pay only 90 percent of the $1,400 rent on his two-bedroom apartment in Milpitas.

'I was stunned,' said [Captain Doe's lawyer]. 'What happened to him is exactly what that statute is designed to avoid.'

On Sept. 14, [Captain Doe] filed a federal suit, demanding that [the employer] compensate him for lost pay and benefits, the cost of replacing his daughter's college savings account, lost options, penalties for liquidating [the employer's] stock, and emotional distress."

Attorney's Fees

As is common with many remedial statutes, a successful reservist employee can recover attorney's fees under section 4323. Additionally, if the employer is found to have willfully violated the Act, the court is empowered to award essentially double damages.

It is not necessary to roll out the red carpet or to throw a parade when an employee returns from uniformed service. It is necessary to very carefully consider the consequences in time, cost, and bad press in failing to re-hire the employee. With an increasing number of returning reservists who, like Captain Doe, are absent for prolonged periods, we will see more, not less, of the issues discussed in this note. BAL

1. 180 days is a "breakpoint" for certain legislative purposes. This article confines itself to service exceeding 180 days in the interest of brevity. Thus narrowly focused, it speaks to returning veterans whose economic well being is most at risk and to employers who may be the most inconvenienced.
2. The statute applies to all employers. There are no requirements relating to minimum size.
3. Courts frequently cite cases decided under predecessor statutes.
4. As this article went to press, the case settled with confidentiality.

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